



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

January 6, 2016

Ms. Elaine Nicholson
Assistant City Attorney
Law Department
City of Austin
P.O. Box 1088
Austin, Texas 78767-8828

OR2016-00364

Dear Ms. Nicholson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 593103 (Austin Ref. Nos. 820203, 820347).

The City of Austin (the "city") received two requests from the same requestor for information related to a specified ethics rule (the "rule") in the Austin City Code, including 1) all documents concerning specified subparts of the rule; 2) all documents pertaining to the rule's application in certain circumstances; 3) all opinions issued pursuant to a specified subpart of the rule over a specified time period; 4) all documents discussing the refusal to issue written opinions pursuant to the specified subpart of the rule; and 5) all documents discussing a requirement of the specified subpart of the rule. You claim the submitted information is excepted from disclosure under sections 552.107 and 552.116 of

the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹

Initially, we note you have marked portions of the submitted information as not responsive to the present request for information. This ruling does not address the public availability of non-responsive information, and the city need not release non-responsive information to the requestor.

Next, we note you did not submit any information responsive to item three of the request as described above. Therefore, to the extent information responsive to this aspect of the request exists, we assume the city has released it to the requestor. If the city has not released any such information, it must do so. Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

Next, we note portions of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2014-13915 (2014). In this ruling, we concluded the city may withhold the information at issue in that ruling under section 552.116 of the Government Code. We have no indication the law, facts, and circumstances on which Open Records Letter No. 2014-13915 was based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter No. 2014-13915 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the previous ruling, we will consider whether the requested information is excepted from disclosure.

Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “to facilitate the rendition of professional legal services” to the client governmental body. TEX. R.

¹We assume the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those: (A) to whom disclosure is made to further the rendition of professional legal services to the client; or (B) reasonably necessary to transmit the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state some of the responsive information consists of communications between city attorneys, employees, and officials. You state these communications were made in furtherance of the rendition of professional legal services to the city. You state these communications were confidential, and the confidentiality of the information at issue has been maintained. Based on your representations and our review, we find you have demonstrated the applicability of the attorney-client privilege to the information you have marked. Accordingly, the city may withhold the information you have marked under section 552.107(1) of the Government Code.

Section 552.116 of the Government Code provides the following:

- (a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, a hospital district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from [required public disclosure]. If information in an audit working paper is also

maintained in another record, that other record is not excepted from [public disclosure] by this section.

(b) In this section:

(1) “Audit” means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, the bylaws adopted by or other action of the governing board of a hospital district, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) “Audit working paper” includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

Gov’t Code § 552.116. You state the information you have marked consists of audit working papers created or utilized by the city auditor during an audit of a city department. You also state the audit was conducted under the authority granted by section 2-3-5 of the Austin City Code. Based on your representations and our review, we find you have demonstrated the information you have marked was prepared or maintained by the city auditor in conducting an audit authorized or required by a city ordinance. *See id.* § 552.116(a), (b)(1), (b)(2). Accordingly, the city may withhold the information you have marked under section 552.116 of the Government Code.

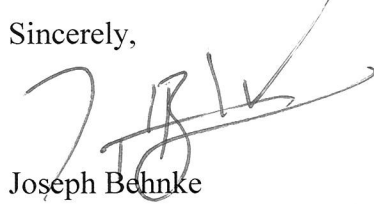
In summary, the city may withhold the information you have marked under section 552.107(1) of the Government Code. The city may withhold the information you have marked under section 552.116 of the Government Code.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at <http://www.texasattorneygeneral.gov/open/>

[orl_ruling_info.shtml](#), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'JB' followed by a stylized flourish.

Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 593103

Enc. Submitted documents

c: Requestor
(w/o enclosures)